

**United States Department of Labor  
Employees' Compensation Appeals Board**

E.L., Appellant	)	
	)	
and	)	<b>Docket No. 12-791</b>
	)	<b>Issued: August 29, 2012</b>
DEPARTMENT OF TRANSPORTATION,	)	
TRANSPORTATION SECURITY	)	
ADMINISTRATION, Albuquerque, NM,	)	
Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 27, 2012 appellant filed a timely appeal from an October 11, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant an allowance for services of an attendant pursuant to 5 U.S.C. § 8111 and 5 U.S.C. § 8103.

**FACTUAL HISTORY**

This case was before the Board on a prior appeal. On August 13, 2008 OWCP accepted that appellant sustained a lumbar sprain, aggravation of lumbar spondylosis and aggravation of

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

lumbar spinal stenosis in the performance of duty on July 12, 2003.<sup>2</sup> Appellant's compensation was suspended on October 2, 2005 for failure to attend a scheduled examination. On August 13, 2008 the Board affirmed the suspension. The history of the case provided in the Board's prior decision is incorporated herein by reference.

The record indicates that, following the suspension of compensation, appellant began receiving compensation for wage loss as of December 18, 2006. On April 27, 2009 OWCP accepted neck sprain and aggravation of displaced cervical disc.

In a report dated January 5, 2011, Dr. Andrew Paterson, an attending orthopedic surgeon, stated that appellant was scheduled for cervical surgery on January 11, 2011. He stated that, following the surgery, appellant would need "some degree of supervised care to help ensure a safe, progressive recovery." Dr. Paterson noted that appellant wanted his wife to provide attendant's services. Appellant underwent cervical discectomy surgery on January 11, 2011.

By letter dated February 18, 2011, OWCP advised appellant that he must submit additional evidence to be entitled to an allowance for attendant's services. Appellant submitted a May 21, 2009 certificate of graduation stating that his wife had completed a caregiver training course.

In a report dated February 21, 2011, Dr. Paterson provided results on examination and stated that appellant was doing fairly well. He recommended continuing with activity restrictions and no excessive bending of his head or neck, no lifting and no high-risk activities for a total of at least 12 weeks from surgery.

Dr. Paterson completed a form report dated April 7, 2011 which noted that appellant was examined on April 4, 2011. He stated that appellant would require attendant's services two to four weeks after surgery, but attendant's services were no longer needed. Dr. Paterson checked boxes that appellant could bath, dress and walk unassisted.

By decision dated October 11, 2011, OWCP denied appellant's request for an attendant's allowance. It found the medical evidence did not establish that attendant's services were required.

### **LEGAL PRECEDENT**

FECA provides for an attendant's allowance under section 8111(a), which provides that OWCP may pay an employee who has been awarded compensation an additional sum of not more than \$1,500.00 a month when OWCP finds "that the service of an attendant is necessary constantly because the employee is totally blind, or has lost the use of both hands or both feet, or is paralyzed and unable to walk, or because of other disability resulting from injury making him so helpless as to require constant attendance."<sup>3</sup>

According to 20 C.F.R. § 10.314, in the exercise of discretion afforded by 5 U.S.C. § 8111, the cost of providing attendant's services will be paid by OWCP under 5 U.S.C. § 8103,

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<sup>2</sup> Docket No. 08-459 (issued August 13, 2008).

<sup>3</sup> 5 U.S.C. § 8111(a).

for personal care services that have been determined to be medically necessary and are provided by a home health aide, licensed practical nurse or similarly trained individual. 5 U.S.C. § 8103(a) provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician which OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.<sup>4</sup> In interpreting section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.<sup>5</sup> OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on its authority is that of reasonableness.<sup>6</sup>

The Board has held that OWCP may pay an attendant's allowance upon a finding that a claimant is so helpless that he is in need of constant care. The claimant is not required to need around-the-clock care. He has only to have a continually recurring need for assistance in personal matters. The attendant's allowance, however, is not intended to pay an attendant for performance of domestic and housekeeping chores such as cooking, cleaning, doing the laundry or providing transportation services. It is intended to pay an attendant for assisting a claimant in his personal needs such as dressing, bathing or using the toilet.<sup>7</sup>

Additionally, a claimant bears the burden of proof to establish by competent medical evidence that he requires attendant care within the meaning of FECA.<sup>8</sup> An attendant's allowance is not granted simply upon the request of a disabled employee or upon request of his physicians. The need for attendant care must be established by rationalized medical opinion evidence.<sup>9</sup>

### ANALYSIS

Appellant has the burden to submit medical evidence to establish that he requires attendant care under FECA. The attendant care must be necessary for personal needs such as dressing or bathing and must be established by probative medical evidence.

Before the January 11, 2011 cervical surgery, Dr. Paterson stated that appellant would need some degree of supervised care following the surgery. He did not provide any additional explanation or detail. In a February 21, 2011 report, Dr. Paterson noted that appellant was doing fairly well postsurgery, without discussing his need for attendant's services following the surgery. In the April 7, 2011 form report, he stated that appellant did not need attendant's services. Dr. Paterson briefly stated that appellant would have need of attendant's services two to four weeks after the surgery, but again he did not provide any additional explanation. He did

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<sup>4</sup> *Id.* at § 8103(a).

<sup>5</sup> *Dale E. Jones*, 48 ECAB 648, 649 (1997).

<sup>6</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts).

<sup>7</sup> *Nowling D. Ward*, 50 ECAB 496 (1999).

<sup>8</sup> *Bonnie M. Schreiber*, 46 ECAB 989 (1995).

<sup>9</sup> *Id.*

not discuss appellant's condition in the two to four weeks following surgery, or explain whether appellant needed recurring help in personal needs such as dressing or bathing.

The Board finds that the medical evidence is not sufficient to establish that attendant's services were medically necessary in this case. Based on the probative medical evidence of record, it was reasonable for OWCP to deny authorization of attendant's allowance.

On appeal, appellant has submitted letters, forms and memoranda regarding his claim. He contends that OWCP claims examiners failed to acknowledge his spouse's caregiver certificate. OWCP's decision was based on the medical evidence of record. The Board has reviewed the evidence of record and finds, for the reasons stated, that OWCP properly determined that appellant was not entitled to an attendant's allowance.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP properly found that appellant was not entitled to an attendant's allowance under FECA.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 11, 2011 is affirmed.

Issued: August 29, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board